

1 Elizabeth Burton Ortiz, Bar No. 012838  
2 Executive Director  
3 Arizona Prosecuting Attorneys'  
4 Advisory Council  
5 3838 N. Central Avenue, Suite 850  
6 Phoenix, AZ 85012  
7 (602) 542-7222 / FAX (602) 274-4215  
8 [Elizabeth.Ortiz@apaacaz.com](mailto:Elizabeth.Ortiz@apaacaz.com)

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10 **IN THE SUPREME COURT**  
11 **STATE OF ARIZONA**

12 In the Matter of:

13 **PETITION TO AMEND RULES**  
14 **4.2, 6.1, 6.5, 6.6, 7.2 AND 7.4,**  
15 **ARIZONA RULES OF CRIMINAL**  
16 **PROCEDURE**

17 Supreme Court No. R-21-0022

18 **COMMENT OF**  
19 **THE ARIZONA PROSECUTING**  
20 **ATTORNEYS' ADVISORY**  
21 **COUNCIL**

22 The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") agrees that  
23 an individual should not be held in detention *solely* because they do not have the  
24 ability to pay bail. As the Petition indicates, changes have been made over the past  
25 few years that have moved Arizona away from a money bail system and that have  
conditioned release on individualized assessments. This Petition attempts to move  
the system even further in that direction, but perhaps in a manner that is inefficient  
and ineffective.

Most bond amounts are determined at an initial appearance hearing. Whatever  
information the State has at that time is presented to the court and the bond amount

1 set. The Petition seeks to mandate a bail review hearing 5 days after the initial  
2 appearance for misdemeanor cases and no more than 7 days after the initial  
3 appearance for felony cases.  
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5 Pursuant to Rule 4.1(b), the State has 48 hours to file charges once an initial  
6 appearance is held. Pursuant to Rule 5.1(a), if the defendant remains in custody, a  
7 hearing must commence no later than 10 days from the initial appearance. Rule  
8 15.1(a)(2) mandates initial discovery be made by the time of the actual preliminary  
9 hearing. Moreover, the disclosure rules only require disclosure of the reports  
10 reviewed by the charging attorney. Therefore, at the time of the newly contemplated  
11 bond review hearing, discovery will be in the very preliminary stages and any  
12 judicial officer will most likely not have more information than it had when the bond  
13 amount was set. Moreover, defense counsel will not have had time to review what  
14 information there is, if it has even been disclosed yet.  
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17 In addition, the sheer logistics of having to set another hearing, assign  
18 personnel, notify any victims, notify witnesses, etc., in such a short timeframe will  
19 burden an already burdened system. Release hearings currently held pursuant to  
20 *Simpson v. Miller*, 387 P.3d 1270 (Ariz. 2017), illustrate this burden on a much  
21 smaller scale. Inevitably, defense counsel have not had sufficient time to review the  
22 materials and discuss with their clients and the first settings are often continued. If  
23 hearings are now added to every case with a bond set, the burden to the system of  
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1 such hearings being set on already congested calendars, where the parties have not  
2 had time to prepare and will inevitably move to continue more often than not, will  
3 serve no purpose but to clog the courts' calendars.  
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5 APAAC is not opposed to appointing counsel for a defendant who is held  
6 pursuant to a bond, nor is it opposed to allowing counsel to request the court to  
7 modify the initial determination of bond. It is perplexing, however, that the Petition  
8 places the burden of proof on the State to prove that the bond already set by the court  
9 is reasonable. While the State is certainly responsible for providing evidence to the  
10 court that supported the setting of the original amount, if the defendant is contesting  
11 conditions of his/her release, the burden should be on the defendant, who now has  
12 appointed counsel, to contest the reasonableness of the release conditions. The Court  
13 has a large amount of information when they make an initial bond determination –  
14 much more than that provided by the prosecutor. A Pretrial Services officer reviews  
15 the defendant's situation and provides information to the judicial officer making the  
16 decision. That judicial officer has information about prior convictions, prior failures  
17 to appear and the seriousness of the alleged offense. Requiring the State to prove  
18 the bond was reasonable assumes that the judicial officer who made the decision  
19 days earlier put in place an unreasonable bond. In every other context in the criminal  
20 justice system, it is the contesting party who has the burden to prove that existing  
21 release conditions are not reasonable.  
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1 Similarly, while existing rules allow a defendant to contest release conditions  
2 if there are new, material facts, the Petition would also allow review any time a  
3 defendant asserts that they cannot afford the bail. As is discussed below, this is an  
4 extremely subjective standard. A defendant could contest review conditions time  
5 and again, regardless of whether previous judicial officers denied previous requests,  
6 regardless of whether the defendant's status remains the same, and regardless of the  
7 victim's position. Imagine a victim's plight where a defendant is constantly asserting  
8 inability to pay and a victim never knows if this is the time a court will grant release.  
9 Victims who are fearful of a defendant will be on a roller coaster, never knowing  
10 what to expect.

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14 The Petition seeks to change language in Rule 7.2(a)(2) to read that a defendant  
15 must be released "unless the court determines that additional conditions are  
16 necessary." This is a change from the current language of reasonableness.<sup>1</sup> By  
17 changing from a reasonable to "necessary" requirement, the Petition creates an  
18 impossible standard. How can any court know whether conditions are "necessary?"  
19 The court can only assess the information before it and determine what is reasonable.  
20 By imposing a requirement as difficult as "necessary," the Petition will be putting  
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25 <sup>1</sup> Current language reads, "This rule does not apply if such a release will not reasonably assure the defendant's appearance or protect the victim, any other person, or the community from risk of harm by the defendant."

1 victims and the community at greater risk and undoubtedly increasing the already  
2 very high number of failures to appear.

3 Further language in the Petition infers that if a defendant is detained for any  
4 offense, they are also given credit for all other offenses, even if they are not formally  
5 detained on those offenses. This is effectively giving concurrent sentences to a  
6 defendant without a judicial finding that it is appropriate.

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8 In any effort to study the issue of reasonable bonds, there must also be a  
9 meaningful definition of indigency or ability to pay. A determination that a  
10 defendant does not have the ability to post the bond amount should not be based  
11 solely on a defendant's statement. There must be a mechanism to determine ability  
12 to pay. If inability to pay could be objectively determined, then APAAC would not  
13 be opposed to this being a factor for the court to consider in determining an  
14 appropriate bond amount. Nor would APAAC be opposed to counsel being  
15 appointed and bond review hearings being set at a reasonable time where the  
16 *defendant* would have the opportunity to present information to the court to contest  
17 the reasonableness of the bond amount previously set.

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19 As currently drafted, however, the Petition imposes too large a burden on the  
20 criminal justice system and APAAC proffers this Comment in opposition.

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1 RESPECTFULLY SUBMITTED this 30th day of April, 2021.

2  
3 Elizabeth Burton Ortiz

4 Elizabeth Burton Ortiz, #012838  
5 Executive Director  
6 Arizona Prosecuting Attorneys'  
7 Advisory Council

8 Electronic copy filed with the  
9 Clerk of the Arizona Supreme Court  
10 this 30th day of April, 2021, by:

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By: Diana Cooney